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Supreme Court of the United States

MEMORIAL DAY WEEKEND SALUTE TO VETERANS CORPORATION, PETITIONER

v.

BILL WICKERSHAM; MAUREEN DOYLE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICUS CURIAE

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STATEMENT OF INTEREST[1]

The International Council of Air Shows, Inc. ("ICAS")[2] is the pre-eminent organizational representative for the air show industry. ICAS has approximately eight hundred sixty-five (865) members including air show performers, air show organizers and support services. Members of ICAS include political subdivisions, corporations and individuals within and without the United States. Among the organizers of air shows in the United States are U.S. military installations, a number of municipal or county airport authorities, city chambers of commerce, air museums, city or community convention and visitors bureaus and private flight clubs.

There are between three hundred (300) and three hundred twenty-five (325) air shows in the United States each year. Of those, approximately forty (40) are held on U.S. Air Force bases. Approximately fifteen (15) are held at U.S. Navy installations.

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[1] Pursuant to Supreme Court Rule 37.2(a), ICAS states that Petitioner and Respondents have given consent to the filing of this Amicus brief. A letter from the Petitioner giving that consent has been duly filed with the Clerk of this Court. Respondents' attorney has advised that Respondents' written consent shall be filed on or before the date Respondent's response to the Petition is due. In accordance with Supreme Court Rule 37.6, ICAS states that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than Amicus, its members or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] ICAS was organized in 1968 under the laws of the state of Wisconsin. It qualifies as a 501(c)(6) non-profit trade association. It maintains an address on the "World Wide Web:" www.icashq.org.

Approximately four (4) are held at U.S. Marine Corps facilities. The balance of two hundred forty (240) or more air shows each year are civilian shows held principally at general aviation airports throughout the country. With only rare exception, those non-governmental air show organizers will rely on governmental law enforcement authorities for crowd control and overall preservation of the peace at their sponsored events.

A question presented by this case is whether non-governmental organizers of air shows or of any publicly attended event become "state actors" for purposes of 42 U.S.C. §1983 if the organizers involve federal or state agencies in the planning of their events, or rely on public services such as police protection during the event. Other questions are whether those event organizers have the right to their own themes or messages for their events, or can they be compelled to accept contrary views at the same place and time. The questions presented are critically important to ICAS and its membership.

ICAS estimates that average attendance at air shows held in the United States is 25,000 to 30,000 people per event. That average takes into account very small shows of 3,000 or 4,000 attendees to very large shows where 150,000 or more attend. Attendance at air show events has risen for the last fifteen years.

If the Eighth Circuit Court of Appeals decision below is not reversed, many ICAS member air show organizers will likely qualify as "state actors" which in turn will affect thousands of people who attend air shows each year. Because ICAS represents a broad

spectrum of interests within the aviation community, its perspective on the issues in this case should be helpful to the Court.

ICAS fully supports an air show organizer's choice to advertise, promote and conduct its air show under the banner of a patriotic or other similar theme.[3] ICAS also supports, and indeed encourages, the enlistment of volunteers for every aspect of an air show performance from preliminary planning to performance scheduling and daily supervision. Moreover, it is apparent to ICAS that Petitioner's annual Memorial Day celebration, which involves over 3,000 volunteers, and which honors and reveres the nation's veterans,[4] combined with the generosity of Petitioner's underwriters, a generosity which is extended to eager thousands who attend the air show each year, are model ingredients for the successful air show and lend themselves well to the objective of promoting the air show as a popular event in North America, one of ICAS's corporate purposes.

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[3] Some ICAS member air show organizers already suggest themes in their own names. For example American Heroes Air Show Network, the California Black Aviation Association, Vidalia Onion Festival Air Show, Wings of Remembrance, Inc., are ICAS member air show organizers.

[4] The Petitioner's event is often singled out to ICAS and its staff as distinctive in its emphasis on and commitment to recognizing both current and former veterans of military service. The historic attendance levels at Petitioner's event are a testament to the enduring appeal of this theme.

STATEMENT

Amicus adopts the statement of the case supplied by the Petitioner. (Pet. 7-10). Petitioner is a private corporation whose purpose is to honor and remember veterans on Memorial Day. It organizes an annual air show at the Columbia Regional Airport, Columbia, Missouri, making use of the skills of approximately 3,000 volunteers. It occupies the air field pursuant to a contract with the City granting it control over the area. Up until the injunction entered by the District Court, the Respondents engaged in protests at the annual air show outside the gates of the secured airport tarmac where no rules are imposed. Inside the secured tarmac, Petitioner disallows commercial solicitation, leafleting, petitioning, political campaigning and unauthorized signs. City police are responsible for insuring the peace at the event, and carefully plan for the crowds, and if a guest violates the rules of admission, the police deal with that by enforcing the laws against trespass.

The Eighth Circuit Court of Appeals[5] affirmed the District Court's[6] entry of injunctive relief which chiefly enjoined Petitioner from enforcing its rules against leafleting and unauthorized signs. In affirming the District Court, the Eighth Circuit concluded that Petitioner was a "state actor" because of the city police role in enforcing Petitioner's rules and because of City participation in planning and operating the air show.

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[5] The case is reported at 481 F. 3rd 591. It is referred to herein for convenience as the "Eighth Circuit Decision."

[6] 371 F.Supp. 2nd 1061.

REASONS FOR GRANTING THE PETITION

This case involves protections afforded not only to individuals but also protections afforded organizers of public events under the First Amendment to the United States Constitution. The Eighth Circuit Decision shows that there is a deep and obvious split in the Courts of Appeals on what constitutes a "state actor" under 42 U.S.C. §1983. As the Petition shows, the Courts of Appeals border on disarray in articulating the proper elements of a "state actor," and clarification of this status is vital to judicial interpretation and application of the Civil Rights Act of 1871 to non-governmental organizers of air shows and other public events. This Court's review and reversal of the Eighth Circuit Court of Appeals will end the conflict between the circuits and bring needed consistency and guidance to the judiciary and event organizers.

The world of aviation supplies an elaborate gallery from which ICAS member organizers can select their themes and messages, and all could qualify as inherently expressive speech.[7] Invariably, those

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[7] Burning the flag of the nation is considered inherently expressive speech under the First Amendment. *See, Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* , 547 U.S. 47, 126 S.Ct. 1297, 1310 (2006), citing with approval *Texas v. Johnson*, 491 U.S. 397, 406, 109 S.Ct. 2533 (1989). Likewise, saluting the flag and honoring those who have defended it over the history of our nation, which are conspicuous activities conducted as part of the theme of Petitioner's air show, are indisputably inherent expressive methods of speech warranting protection under the Amendment. Certainly, the Petitioner's speech was **at least** as expressive as the parade honoring St. Patrick in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, (1995) another of Petitioner's principal citations. (Pet. at 19). One would hope that

themes and messages are tailored to have their most effective broadcast when joined with the pageant of modern aircraft and aerobatics. The ability of an organizer to champion a theme or message within the context of a publicly attended air show without sharing the same field with persons who oppose that message is gravely weakened, if not utterly denied, by the Eighth Circuit's Decision.

Under the shadow of the Eighth Circuit Decision in this case, non-governmental event organizers who anticipate extensive public attendance must struggle with whether they constitute "state actors" who face extraordinary liability if they rely on governmental enforcement authorities to prohibit trespass based on violations of their rules.

It would come as a complete shock and surprise to many air show organizers who occupy government owned airports under permit, lease or contract for a one or two day event that because police protection is provided for the performances, the organizer is now converted to an agent of the state itself and subject to liability under the remedy supplied by 42 U.S.C. §1983 for restricting leafleting within the fenced in confines of the air show theater.

This is a classic case for the Court's review. Reversal of the Eighth Circuit Decision is of cardinal importance.

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for purposes of the First Amendment our nation's flag and the veterans who defended it would be on par with this special saint.

I. THE COURT SHOULD REJECT THE COURT OF APPEALS' DETERMINATION THAT PETITIONER IS A "STATE ACTOR."

The Eighth Circuit Court of Appeals' concept of a "state actor" under 42 U.S.C. §1983 is in startling conflict with indistinguishable decisions of the 4th and 6th Circuit Courts of Appeals, and the Petition makes that plainly evident. (Pet. at 11-16.) Amicus will not repeat Petitioner's arguments but will emphasize here that as the facts of this instant case will support, Petitioner was no more connected with the state than the private organizer of the "Memphis in May" festival in *Lansing v. City of Memphis*, 202 F. 3rd 821 (6th Cir. 2000) or the private organizer of the festival targeted in *UAW, Local 5285 v. Gaston Festivals, Inc.*, 43 F.3rd 902 (4th Cir. 1995). The need for harmonizing the lower courts on this important issue could not be more apparent.

A. *The Price of Admission*

Unlike Petitioner, many ICAS member organizers charge an admission fee for the privilege of attending an air show event. Like Petitioner, those organizers will generally engage multiple federal and state agencies in the planning of their events such as the Federal Aviation Administration. Participation by this particular federal agency in the planning of air show events is not merely common but absolutely essential. In the planning phase, air show organizers may also involve the Department of Defense, various branches of the military service, municipal airport management, fire protection and waste disposal agencies. They may need to acquire permits from governmental health departments, waivers from

federal and state aviation regulators and inspections from all of the above. And they will customarily rely on local law enforcement to patrol the secured area of the air show to assure that those who attend will comply with the scope of the invitation. This degree of contact with governmental authorities is expected from ICAS members. As the principal provider of training in the air show industry, ICAS constantly teaches and reinforces the importance of working closely with local and federal law enforcement and regulatory agencies to de-conflict and make sure that the event is conducted without incident.

The Eighth Circuit Decision would label the air show organizers just described as "state actors" for purposes of the remedy provided by §1983. Does that moniker change if the organizer charges an admission fee? Is the admission fee inimical to rights protected under the First Amendment?

In a number of cases, this Court has ruled that constitutional violations may arise from the deterrent, or "chilling," effect of governmental rules that do not directly prohibit the exercise of First Amendment rights. *See, Laird v. Tatum,* 408 U.S. 1, 11, (1972) and cases cited therein. Under this line of cases, can the air show organizer bar entry to someone who refuses to pay the admission fee even though he or she professes to have the right to express protected speech within the secured area? If not, does the organizer have the authority to determine at the gate which individuals have inherent expressive speech protected under the First Amendment such that the admission fee must be waived? At what point will the organizer's right to control access to the secured area and cover the

expense of the event, and the rights of dissidents to express speech in the same area, be balanced? These questions lay waiting in the background as long as the Eighth Circuit Decision below has continued vitality.

B. *Considerations of Safety*

ICAS's corporate purposes include maintaining "a constant vigil on air show safety in cooperation with appropriate regulatory agencies;" and educating "its members through programs that promote safety, professionalism, showmanship and economic viability."

Amicus will not neglect these corporate purposes, and must raise the issue of safety with the Court. The District Court and the Eighth Circuit below ostensibly considered safety issues air show organizers confront for their performances. Organizers must be constantly vigilant in the control and disposal of debris around performing and even static displayed aircraft. Leafleting and the carrying of signs bearing protected speech may be relatively benign from a safety standpoint but Amicus has not had a meaningful opportunity to investigate this matter with all of its members. Suffice it to say, an additional hazard should not be added unnecessarily to the mix of dangers air show event organizers contend with already. Reversal of the Eighth Circuit's decision would eliminate completely any thought of contingent planning for leaflet disposal, restrictions on sign carrying, size or display, or sectioning part of the air field's secured area for purposes of fixing the locus of protected speech activities.

Moreover, it would be perilous if event organizers decided to limit their involvement with government authorities as a result of the Eighth Circuit Decision. Would an organizer's reliance on private security personnel to enforce the rules of conduct in the secured area be enough to allow the organizer to escape becoming a "state actor?" Would those private security personnel be adequately trained to handle a terrorist threat at the event, or have sufficient staff for patrols and the stationing of guards? The Eighth Circuit Decision may very well have the effect of separating organizers of not only air show events, but any other private group, from governmental agencies in the planning and holding of their sponsored events. It is difficult to imagine a Saturday morning bicycle race without the involvement of local law enforcement officials on traffic issues, yet if every private organization that uses a government owned or operated property or utilizes enforcement services from local police is instantly labeled a "state actor," there will be substantial consequences to this sea change in the interpretation of §1983.

II. THE COURT SHOULD APPLY THE PRINCIPLES IT ANNOUNCED IN *HURLEY*. PETITIONER AND ORGANIZERS OF LIKE AIR SHOWS CANNOT BE COMPARED TO COMMERCIAL SHOPPING VENUES.

The Eighth Circuit cited *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) as a controlling authority for its decision. Petitioner points out accurately that it is inapposite. (Pet. at 19). ICAS agrees with Petitioner that *Hurley v. Irish-American*

Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, (1995) has been ignored in error by the Eighth Circuit, and *Hurley* should govern here.

Air shows are characteristically temporary and circus like. They are akin to festivals, carnivals and fairs that have a limited life but appeal to a great many patrons. Air shows require more planning and detail than a community art festival, but the essential features do not change. The non-governmental organizers of air shows have similar duties to organizers of smaller events but their duties unquestionably involve greater complexities. Nonetheless, it is under the analysis in *Hurley* that air shows like Petitioner's fit precisely.

Petitioner highlights the Eighth Circuit's resort to two rather new tests in interpreting First Amendment matters. The first was whether the Respondents' conduct was shown to threaten Petitioner's message and the second, whether that message was diluted by a ". . .small number of sign carriers and leafleteers at the 2005" event.[8] (Pet. at 20 quoting from Pet. App 17a.) As a consequence of the Eighth Circuit's Decision, the prospect is unsettling but bright that the number of sign carriers and leafleteers arriving at the gates of privately organized air shows in the future will be more than just a few, and the selected

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[8] Only a few of the Respondents apparently exercised the rights under the injunction issued by the District Court, but the Eighth Circuit Decision is an invitation to thousands to engage in like behavior at ICAS member organized events. ICAS, and this Court, cannot pretend that this matter affects obscurities of the First Amendment which will touch just a few people in Missouri and no more.

message or theme of the air show will be horribly distorted, muted or fully lost in the cacophony. Use of these two tests may be a tribute to judicial inventiveness but they have no place under the governing analysis of *Hurley*.

ICAS supports the Petitioner's contentions that the First Amendment should not be interpreted in this setting to compel Petitioner, or those in like circumstances, to create at their own expense a forum in which their own message must be given parity on the same premises with one opposing it. Petitioner should have the right under the First Amendment to control the intensity of its own message or theme within the borders of its secured area, and in exercise of that right, may exclude those who would openly express disrespect or disagreement with that message. Petitioner offers an invitation to the public to engage in an assembly where its message is trumpeted. The invitation is conditional in that those with views contrary to Petitioner's message must leave their own trumpet at the gate where it can be retrieved when they leave.

Finally, ICAS supports the right of any public event organizer like Petitioner to choose who participates in their event and how they participate. Not just Petitioner, but all privately organized air shows, festivals, concerts, Little League games, 10K running races and a host of other events held on or in air fields, stadiums, or thoroughfares under lease or license from their government owner will be adversely affected if the Eighth Circuit Decision is not reversed.

CONCLUSION

For the foregoing reasons the Court should grant the petition for writ of *certiorari*. The Court should also reverse the Eighth Circuit.

Respectfully submitted,

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